No. 11591

In the

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

FRED GERARD and ROSE GERARD,

Appellants,

vs.

UNITED STATES OF AMERICA, J. T. SHERBURNE and EULA SHERBURNE, husband and wife, G. S. FRARY and BESSIE L. FRARY, his wife, W. H. MERCER and GEMMA N. MERCER, his wife, MILTON MERCER and CARMA MERCER, his wife, GUY McCONAHA and IDA McCONAHA, his wife, and FRED SHUPE,

Appellees,

BRIEF OF APPELLEES

G. S. Frary, Bessie L. Frary, W. H. Mercer
Gemma N. Mercer, Milton Mercer
and Carma Mercer.

H. C. Hall,
Edw. C. Alexander,
Great Falls, Montana,
Attorneys for Appellees.

Upon appeal from the District Court of the United States for the District of Montana.

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Upon appeal from the District Court of the United States for the District of Montana.

JURISDICTION

The action now presented is a statutory action to determine adverse claims to the title to real property under the provisions of Sections 9479 and 9480, Revised Cases of Montana, 1935. So far as here applicable Section 9479 provides:

> "An action may be brought and prosecuted to final decree, judgment, or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons, both known or unknown, who claim or may claim any right, title, estate, or invest therein, or lien or incumbrances thereon, adverse to plaintiff's ownership, or any cloud upon plainfiff's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued, for the purpose of determining such claim or possible claim, and quieting title to said real estate."

Section 9480 provides:

> "In any action brought under the preceding section, the plaintiff may join as defendants any or all persons, known or unknown, claiming, or who might claim, any right, title, estate or interest in, or lien or encumbrance upon, the real property described in the complaint, or any thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible of dower, inchoate or accrued, and including the person or persons in possession if the plaintiff is not in possession. If the plaintiff shall desire to obtain a complete adjudication of the title to the real estate described in the complaint, he may name as defendants all known persons who assert or who might assert any claim as in this section above specified, and may join as defendants all persons unknown who might make any such claim, by adding in the caption of the complaint in such action

the words, 'and all other persons, unknown, claiming or who might claim any right, title, estate, or interest in, or lien or encumbrance upon, the real property described in the complaint, or any thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued.' "

See:

Slette v. Review Publ. Co.,
71 Mont. 518, 230 Pac. 580;

Aronow v. Anderson,
110 Mont. 484, 104 Pac. (2d) 2.

The land involved is located in Montana, and all parties, plaintiff and defendant, are resident therein. (R. pp. 3, 4). No diversity of citizenship is suggested in the complaint.

The only allegations of the complaint applicable to these appellees are found in paragraphs III and XI, and are as follows:

Paragraph III, (R. p. 4):

"That the defendants . . . W. H. Mercer and Gemma N. Mercer, his wife; Milton Mercer and Carma Mercer, his wife; G. S. Frary and Bessie L. Frary, his wife, are citizens of the United States and all reside at Browning, Montana, except G. S. Frary and Bessie L. Frary, who reside at Cut Bank, Montana . . . ."

Paragraph XI, (R. p. 12):

"The plaintiffs further allege that the defendants . . . W. H. Mercer and Gemma N. Mercer, his wife, Milton Mercer and Carma Mercer, his wife, G. S. Frary and Bessie L. Frary, his wife, and each and all of them claim some right, title or interest in or to, or assert some claim, lien or demand upon the real property described in paragraph IV of this

> complaint superior to the title of each of these plaintiffs; that such claims and assertions of claim are void and of no legal force and effect and that the ownership of the plaintiffs . . . is superior to any right, title or interest claimed or that may be claimed by any of the said defendants or any lien, claim or demand whatsoever or the defendants in and to the same or any part thereof."

These allegations together with the allegations of ownership in plaintiffs appearing in paragraph VII, (R. p. 8), are the only allegations necessary to state a cause of action under section 9479, R. C. M. 1935, quoted supra.

> Slette v. Review Publ. Co.,
> 71 Mont. 518, 230 Pac. 580;
>
> Nadeau v. Texas Co.,
> 104 Mont. 558, 69 Pac. (2d) 586.

But such allegations do not disclose any Federal question sufficient to give either the United States District Court or this court jurisdiction.

These defendants are in no way connected by allegations in the complaint with the issuance of the fee patents, (Par. VI. R. pp. 7, 8) with the taxation of the land and its sale to W. R. McDonald, (Par. VIII, R. p. 10); or with any possible conveyances, transfer or mortgage that may have been made by plaintiffs, (Par. *IX*, R. pp. 10, 11).

Under such circumstances there is no jurisdiction in this court or the lower court as concerns these appellees.

> Taylor v. Anderson,
> 234 U. S. 74, 58 L. Ed. 1218;
>
> Boston & M. Consol. C. & S. M. Co. v. M. O. P. Co.,
> 188 U. S. 632, 47 L. Ed. 626;

Joy v. St. Louis,
201 U. S. 332, 50 L. Ed. 776;

Devine v. Los Angeles,
202 U. S. 313, 50 L. Ed., 1016.

STATEMENT OF THE CASE

As heretofore noted, the action filed by complainants is, so far as concerns these appellees, an action to determine adverse claims to real property under the provisions of section 9479, Revised Codes of Montana, 1935. From the complaint the following matters appear either by allegations of fact or the legal conclusion of the pleader:

Complainants are of Indian blood, members of the Blackfeet Tribe and wards of the United States. They were each allotted certain lands in Glacier County and on February 28, 1918 trust patents were issued to them for such lands pursuant to the treaty of 1887. The trust patents contained the provision that the lands should be held in trust for a period of 25 years, and that any conveyance made during the trust period should be absolutely null and void. The trust period was indefinitely extended on June 18, 1934 by the provisions of the Wheeler-Howard bill (48 Stat. 984).

On June 11th, 1918, fee patents to the lands in question were issued to complainants without their application or consent and in violation of the provisions of the trust patents, and in violation of the treaty of 1887 and the Allotment Act of February 11, 1887. By reason of the provisions of the trust patents and of the treaty of 1887 and the Allotment Act complainants became vested with certain rights in said lands preventing alien-

ation or taxation thereof, and that complainants are the owners of the lands here involved and entitled to the possessions thereof. After the fee patents were issued to complainants taxes were levied against the lands by Glacier County, Montana. Such taxes were allowed to become delinquent and the land was sold by Glacier County at tax sale and thereafter conveyed by the county to one W. R. McDonald. The fee patents were forced upon complainants by the Indian Bureau by representations that they must be accepted and that the lands must be rendered subject to taxation. Any conveyance of the lands by complainants was not approved and if any such transfer was made it was null and void. Under the provisions of the fee patents the lands remained inalienable and non-taxable. It is further alleged that these appellees claim some title or interest in the lands superior to the title of complainants, but that such claims are void and of no legal effect.

The following relief is requested:

(a) That it be adjudged that appellees have no interest in the lands;

(b) That it be determined that the fee patents were issued without the application or consent of complainants;

(c) That complainants be declared to be the owners of the lands;

(d) That the lands be adjudged to be inalienable and immune from taxation.

The complaint was filed September 20, 1945, (R. p. 14), more than 27 years after the issuance of the fee patents.

Appellees filed motions to dismiss the complaint, (R. pp. 15-18, 24). On February 8, 1947, the District Court rendered its decision and ordered the complaint dismissed. (R. pp. 26-34). On February 26, 1947, judgment of dismissal was entered. (R. pp. 35, 36). From the order and judgment of dismissal, this appeal is taken. (R. pp. 39, 40).

QUESTIONS PRESENTED

1. Neither this court nor the lower court has jurisdiction.

2. The complaint fails to state a claim upon which relief can be granted in favor of complainants, or either thereof, and against the appellees or any thereof, for the reason that:

(a) Complainants may not, in an action such as this, collaterally attack the fee patents covering the lands in question issued by the United States on June 11, 1918.

(b) After fee patents are issued by the United States the lands covered thereby are subject to transfer and taxation.

(c) The state statutes of limitation are applicable as against these complainants and preclude any recovery herein.

(d) There is no allegation in the complaint that plaintiffs have been in possession of the lands at any time since October 25, 1930.

(e) From the allegation of the complaint, it may be properly inferred that complainants have made a voluntary conveyance or mortgage of the lands

after issuance of fee patents. If so, they are now estopped to attack such patents or to claim an interest in the lands.

ARGUMENT

1. *Jurisdiction.*

The question of jurisdiction has been heretofore presented in this brief and need not be here repeated.

2. *This is a collateral attack.*

The attack made by complainants upon the fee patents issued to them in 1918 is a collateral attack and will not be permitted.

Chatterton v. Lukin,
116 Mont. 419, 154 Pac. (2d) 798,

(Certiorari denied by Supreme Court June 18, 1945);

Mouat v. Minn. M. & S. Co.,
68 Mont. 253, 217 Pac. 342;

Pittsmont Copper Co. v. Vanina,
71 Mont. 44, 227 Pac. 46;

Carter v. Thompson,
65 Fed. 329;

St. Louis S. & R. Co. v. Kemp,
104 U. S. 636, 26 L. Ed. 875;

United States v. Maxwell Land Co.,
121 U. S. 325, 30 L. Ed. 949;

De Guyer v. Banning,
167 U. S. 723, 42 L. Ed. 340.

3. *After issuance of fee patents the lands became subject to alienation and taxation.*

By specific statute, (24 Stat. 390, 34 Stat. 182, Title 25 U. S. C. A. Sec. 349), it is provided:

"That the Secretary of the Interior may, in his discretion, and he is authorized, wherever he shall

> be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrances, or taxation of said land shall be removed . . ."

See:

Larkin v. Paugh, 276 U. S. 431, 72 L. Ed. 640.

The issuance of the fee patents was, in effect, a finding of competency with respect to complainants.

United States v. Lane, 258 Fed. 520;

United States v. Debell, 227 Fed. 760.

If, as suggested in appellants' brief (pp. 22, 23), complainants do not desire that the fee patents be cancelled, then it is clear that, under the express provisions of the statute, they have no standing in court. Certainly the fee patents cannot be disregarded and the present action be considered as an action to obtain possession of a trust allotment. If such were the purpose and theory of the action then the ordinary law action of ejectment would lie and a court of equity would have no jurisdiction.

Davidson v. Calkins, 92 Fed. 230;

B. & M. Consol. C. & S. M. Co. v. M. O. P. Co., 188 U. S. 632, 47 L. Ed. 626.

Complainants cannot have a fee patent and remain immune from taxation. Neither can they base their possessory rights upon a trust patent which has been superseded by a fee patent.

4. *The state statutes of limitations preclude recovery herein.*

The action here was commenced more than 27 years after the issuance of the fee patents. Apparently com-

plainants have not been in possession of the lands since October, 1930. (R. p. 10; appellants' brief, p. 21).

By statute, (32 stat. 284, Title 25 U. S. C. A. Sec. 347), it is provided:

> "Limitations of actions for lands patented in severalty under treaties. In all actions brought in any State court or United States court by any patentee, his heirs, grantees, or any person claiming under such patentee, for the possession or rents or profits of lands patented in severalty to the members of any tribe of Indians under any treaty between it and the United States of America, where a deed has been approved by the Secretary of the Interior to the land sought to be recovered, the statutes of limitations of the States in which said land is situate shall be held to apply, and it shall be a complete defense to such action that the same has not been brought within the time prescribed by the statutes of said State the same as if such action had been brought for the recovery of land patented to others than members of any tribe of Indians."

Section 9015 Revised Codes of Montana, 1935 provides:

> "No action for the recovery of real property, or for the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the property in question within ten years before the commencement of the action."

The above section applies to actions to quiet title and in ejectment.

> Thompson v. Chicago, M. & St. P. R. R. Co.,
> 78 Mont. 170, 253 Pac. 313;
>
> Kurth v. Le Jeune,
> 83 Mont. 100, 269 Pac. 408.

The state statute, therefore, bars recovery here.

Thlocco v. Magnolia Petroleum Co.,
141 Fed. (2d) 934;

Stewart v. Keys,
295 U. S. 403, 79 L. Ed. 1507;
42 C. J. S. p. 654, 655;

Foreman v. Marks,
117 Okla. 285, 246 Pac. 441;

Ward v. Love County,
253 U. S. 17, 64 L. Ed. 751.

5. *Complainants were not in possession of the lands when the action was commenced.*

"The rule is well settled in federal court that before an action, such as this, may be brought, it must be alleged that the complainants were in possession of the land at the time of the commencement of the action.

"In B. & M. Com. C. & S. M. Co. V. M. O. P. Co., 188 U. S. 632, 47 L. Ed. 626, the complaint alleged that complainant 'is the owner and entitled to possession of certain property therein described.' The court said:

> " 'It is also objected that, as a bill of peace or to quiet title, it is defective, because there is no allegation that the complainant was in possession, which is necessary in such a bill. If not in possession, an action of ejectment would lie. The contention that under the Code of Montana a person not in possession may maintain an action to quiet title cannot prevail in a federal court.'

"In Subirana v. Kramer, 17 Fed. (2d) 725, the complaint alleged that 'the complainants are the owners in fee of the following estate.' The court said:

> " 'Then again a bill quia timet, or to remove a cloud upon real estate, should allege not only that the plaintiffs are in possession, but that their title has been established by at least one successful trial at law. Boston, etc. Min. Co. v. Mont. Ore. Co., 188 U. S. 632, 641, 23 S. Ct. 434, 47 L. Ed. 626;

> Holland v. Challen, 110 U. S. 15, 20, 3 S. Ct. 495, 28 L. Ed. 52.' "

In complainants' complaint it is nowhere alleged that they are in possession or have been since 1930 in possession of the lands. Indeed, possession of appellees is admitted and asserted in appellants' brief. (Brief pp. 7, 8).

6. *Complainants have made voluntary transfers of the land and may not now claim title or right of possession.*

In paragraph IX of plaintiffs' complaint, (R. p. 11) it is alleged:

> ". . . that any conveyance or transfer made by the plaintiffs or either of them, by mortgage or otherwise, was never approved by the President of the United States, or by the Secretary of the Interior, or any official of the United States having authority to approve any contract or transfer of real property made by any member of the Blackfeet Tribe of Indians; that if any such transfer was made, the same was null and void under the agreements and statutes hereinbefore cited."

These allegations can mean but one thing—that a voluntary conveyance was made of the property after the issuance of the fee patents. That this is true is recognized in the appellants' brief. (Brief pp. 21, 25, 26).

By 44 Stat. 1247, (Title 25 U. S. C. A. Sec. 352a), it is provided:

> ". . . The Secretary of the Interior is hereby authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the orginal or trust patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefor by the allottee or by his heirs:

> Provided, That the patentee has not mortgaged or sold any part of the land described in such patent: Provided also, That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent had never been issued."

This statute constitutes a recognition by Congress that a sale or encumbrance of the land after issuance of fee patent is the equivalent to an application for and a consent to the issuance of the fee patent.

See:

> Board of Comrs. Caddo Co. v. U. S.,
> 87 Fed. (2d) 55.

7. Conclusion.

It is apparent from a reading of appellants' complaint and brief that they are not at all certain as to the theory upon which they are proceeding. Much of the argument in appellants' brief is upon matters wholly outside the record. It appears to be assumed in appellants' brief that these appellees are in some manner and by some allegation connected with the tax title to the lands which came to W. R. McDonald. Such is not the case. It is purely a matter of conjecture why these appellees are parties to the action. Whether their claim of title is derived from McDonald or through mortgage or other voluntary conveyance by appellants or by adverse possession is a matter as to which we are left entirely in the dark. The action as to these appellees is purely and simply an action under the state statute to determine adverse claims of which the Federal Courts have no jurisdiction.

Although appellants disclaim any desire to cancel the fee patents, it is certain that if the fee patents are left outstanding appellants cannot prevail here in view of express statutory provisions. It is equally certain that appellants may not at this late date attack the fee patents which they have recognized by voluntary mortgage and conveyance of the lands described therein. Neither equity nor statute will permit an action such as is here presented.

It is assumed that other appellees will present argument upon other matters to the court in their briefs.

It is respectfully submitted that the judgment dismissing the complaint as to these appellees should be affirmed.

Respectfully submitted,
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